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No. 75-130

Supreme Court of the United States

October Term, 1975

ROBERT J. QUINN, INDIVIDUALLY AND AS COMMISSIONER OF THE CHICAGO FIRE DEPARTMENT,

Petitioner,

v.

FRANCIS MUSCARE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

AND

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

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INDEX

Page

MOTION:

Interest of the AFL-CIO iii
The Issue to be Covered in the AFL-CIO's Brief *Amicus Curiae* iv
Conclusion v

BRIEF:

Argument 1
Conclusion 16

CITATIONS

CASES:

Arnett v. *Kennedy*, 416 U.S. 134 1
Barry v. *Dwen*, No. 74-1269 3
Bivens v. *Six Unknown Named Agents*, 403 U.S. 388 3
Bolling v. *Sharp*, 347 U.S. 497 9
Crews v. *Clone*, 432 F.2d 1259 10
Dandridge v. *Williams*, 397 U.S. 471 3
Goss v. *Lopez*, 419 U.S. 565 1
Hostrop v. *Board of Junior College Dist. No. 515*, 523 F.2d 569 2
Kent v. *Dulles*, 357 U.S. 116 9
Keyishian v. *Board of Regents*, 385 U.S. 589 13
Meyer v. *Nebraska*, 262 U.S. 390 10
O'Connor v. *Donaldson*, 422 U.S. 563 11
Pierce v. *Society of Sisters*, 268 U.S. 510 10
Poe v. *Ullman*, 367 U.S. 497 9
Regional Rail Reorganization Act Cases, 419 U.S. 102 3
Richards v. *Thurston*, 424 F.2d 1281 10
Roe v. *Wade*, 410 U.S. 113 ..... 9, 11
Shapiro v. *Thompson*, 394 U.S. 618 9
Stanley v. *Georgia*, 394 U.S. 557 9

	Page
United States v. *ITT Continental Baking Co.*, 420 U.S. 223	3
Wood v. *Stickland*, 420 U.S. 308	3

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MOTION BY THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) hereby respectfully moves for leave to file a brief amicus in the instant case in support of the position of the Respondent, as provided for in Rule 42 of the Rules of this Court. The consent of counsel for the Respondent has been obtained. Counsel for the Petitioner have refused their consent.

INTEREST OF THE AFL-CIO

The AFL-CIO is a federation of 115 national and inter-

national unions having a total membership of approximately 13,500,000 working men and women.

Many of the Federation's affiliates represent employees of the federal, state, municipal and county governments, and of other governmental bodies such as school boards and public universities. To those employees, the issues in this case are of vital importance. First, since most of these workers are dependent upon their incomes to meet their daily needs, the right to adequate notice and an opportunity to be heard before they can be deprived of that income for as long as one month is critical. And second, to require that public employees conform their appearance to rigid norms not required by any important public interest related to their employment, in ways which affect them in their off-duty hours as well as when at work, is to deny them the right to determine one's own appearance enjoyed by the general public, and to segregate them from their contemporaries in their private as well as their public lives. This being so, the Federation's interest in presenting its views to this Court upon this case is evident.

THE ISSUE TO BE COVERED IN THE AFL-CIO'S BRIEF AMICUS CURIAE

Respondent has limited his brief to the procedural due process issue upon the premise, in which we concur, that the issue of the validity of the grooming regulations ought not be considered at this time by the Court, since it was not decided by the Court of Appeals. Because we believe the procedural due process issue has been fully covered by Respondent and other amici curiae supporting his position, we do not in our brief cover this issue, except to express our agreement with the Court of Appeals and Respondent.

Rather, to assure that the issue of the validity of the grooming regulation is discussed on Respondent's behalf in this case should the Court find reason to address the question, we confine our substantive argument to that issue.

CONCLUSION

For the above-stated reasons, we respectfully urge the Court to grant this motion to file the accompanying brief amicus in the instant case in support of the position of the Respondent.

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

The American Federation of Labor and Congress of Industrial Organizations (hereinafter "AFL-CIO") files this brief contingent upon the granting of the foregoing motion.

ARGUMENT

I. INTRODUCTION

The AFL-CIO agrees with Respondent that, as the Court of Appeals held, this Court's decisions in *Arnett* v. *Kennedy*, 416 U.S. 134 and *Goss* v. *Lopez*, 419 U.S. 565, necessitate a holding that Lt. Muscare was unconstitutionally denied procedural due process when he was suspended for

twenty-nine days from his employment as a fireman without any notice prior to his suspension sufficient to apprise him of the reasons therefor, and with no opportunity whatever to contest before a person vested with authority to impose the punishment the grounds for his suspension, on factual or legal grounds, or the propriety of the penalty set, until after the suspension was effective. Since the Court of Appeals found the suspension unconstitutional for that reason alone, it had no occasion to address the additional grounds pressed for invalidating the suspension, involving the substantive bases upon which Respondent was subjected to loss of his income for a time.

Ordinarily, this Court, when presented with an independent issue which the Court of Appeals properly did not reach because of the view it took of the case, will determine only the issue decided below and, if the decision is to reverse on that question,[1] provide the Court of Appeals the opportunity to decide the remaining issue or issues in the first instance. See, e.g., *Wood* v. *Stickland,* 420 U.S. 308, 327; *United States* v. *ITT Continental Baking Co.,* 420 U.S. 223, 226 n. 2 and cases cited; *Bivens* v. *Six Unknown Named Agents,* 403 U.S. 388. See also cases cited in Brief for Respondent, at 2, n. 1.

[1] Conceivably, the validity of the hair regulation could remain a live issue in this case even if the Court of Appeals is affirmed on the procedural due process question. The Court of Appeals for the Seventh Circuit has recently held, in a case decided after this case, that while damages are available for deprivation of procedural due process rights, the measure of these damages is not necessarily the full amount of wages lost. *Hostrop* v. *Board of Junior College Dist. No. 515,* 523 F.2d 569 (7th Cir. 1975). On the other hand, it seems clear that if Respondent's suspension were substantively invalid, he would be entitled to all wages lost as damages. However, since the issue of the appropriate remedy is not before this Court, and the correctness or applicability of the *Hostrop* rule therefore not now pertinent, it must be left to the lower courts upon remand to determine whether *Hostrop* necessitates reaching the validity of hair regulation. Since *Hostrop* was decided after this case, and since the district court has already decided the hair issue while the Court of Appeals has not, the remand, if any, should be to the Court of Appeals.

We can preceive no reason for departing from this rule in the present case. In instances in which this Court has determined questions not decided below, the two grounds for decisions were usually intimately interrelated, e.g., *Dandridge* v. *Williams,* 397 U.S. 471, n. 6, or there were extenuating circumstances justifying hurrying the case to its final conclusion, e.g., *Regional Rail Reorganization Act Cases,* 419 U.S. 102, 140 n. 25. Here, the procedural and substantive challenges are entirely separate in the applicable legal considerations, and there is no special reason why the parties require the immediate determination of the substantive challenge. While it is true, as petitioners assert (Brief for Petitioner, at 33-34), that another petition for certiorari may result, this is always the case when the Court remands for consideration of issues not decided by the Court of Appeals.

We recognize, however, that the Court may perceive reasons for reaching and deciding the validity of the grooming regulation,[2] and that it does not lack the power to do so. See *Dandridge, supra; Regional Rail Reorganization Cases, supra.* For this reason, and because Respondent and amici supporting its position have, we understand, determined to

[2] For example, this Court, in *Barry* v. *Dwen,* No. 74-1269, argued December 8, 1975, is now considering the principles affecting the validity of hair rules for policemen.

present argument only upon the procedural due process question, we present our views upon the validity of the grooming code for violation of which Lt. Muscare was disciplined, rather than burden the Court with another exposition of the relatively simple procedural due process question. We begin with a short exposition of the record upon the grooming code issue and proceed to discuss the legal questions we believe to be involved.

II

Section 51.133 of the Rules and Regulations of the Chicago Fire Department prescribe certain personal appearance requirements for uniformed personnel. The Rule provides:

> "Section 51.133. Proper Personal Appearance. All members of the Chicago Fire Department shall present a clean and proper appearance in personal care and attire at all times. The face shall be clean-shaven, except that a non-eccentric mustache is permissable. Mustaches shall not extend beyond a line perpendicular to the corner of the mouth and the full upper lip must be readily visible.
>
> Sideburns shall be trimmed short and shall be no lower than a line from the middle of the ear.
>
> Hair shall be worn neatly and closely trimmed, and the hair outline shall follow the contour of the ear and slope to the back of the neck. It will be gradually tapered overall, in order to present a neat appearance."[3]

The standards in Rule 51.133 are applicable to all uniformed personnel of the Department, without regard to whether or not their duties involve active firefighting.

[3] This formal promulgation replaced two earlier formulations of grooming rules. (App. 125-126; 156-157).

(App. 118-120). It is to be noted that while the Rule absolutely forbids beards, it does not proscribe all forms of facial hair: certain mustaches and sideburns are permitted. Further, the Rule regulates hair other than facial hair, and forbids certain hairstyles even though no hair extends beyond the collar or onto the face.

Lt. Muscare, when he was suspended on February 27, 1974, had a small mustache and a short goatee (App. 5, 10-11). The notice of suspension, received several days thereafter, specified violation of Rule 51.133 as a ground for his suspension (App. 12).[4]

The sole justification offered by the Department for the challenged hair regulations was that safety considerations, in particular the need for effective use of a certain self-contained breathing apparatus used in fire-fighting situations, necessitated that firemen not wear facial hair. Petitioner not only did not proffer any other explanation, but its spokesmen explicitly testified that neither a general interest in discipline and obedience nor a concern with appearance of firemen was the purpose of the rule. For example, while Chief Foley testified that the Department is "paramilitary" (App. 111), he meant by that only "that we have levels of

[4] As far as the record shows, the claimed violation of two other sections of the Rules and Regulations charged in the Notice was also based solely upon violation of the grooming rules (App. 117, 148), although Respondent had no way of knowing this when he received the notice since no supporting facts whatever were specified. While there is some implication in Petitioner's Brief that Lt. Muscare was ordered at a training class in December, 1973 to don his mask and to walk down stairs with it on but refused to do so (Brief for Petitioner 8), it is, as the Court of Appeals stated, (App. 161) "unclear whether Lt. Muscare, as a senior officer, was required to participate in the training." (See App. 70).

rank" (App. 115), but maintained that "[i]t doesn't necessarily stand to follow that our operational orders are of a military nature" (App. 115) and, in particular, denied that "you want orders obeyed in a military sense" (App. 117-118), saying "No, we want orders obeyed because we have a reason to have a man clean-shaven, for safety with air gear." (App. 118). Similarly, Chief Foley testified that "[t]he basic premise of the clean-shaven order is safety, not appearance." (App. 112).

The evidence upon the relationship between the breathing apparatus and facial hair was as follows:

The Fire Department instituted a self-contained breathing apparatus program in 1958. (App. 100). The administrative goal is two such pieces of equipment for each five-man company of the kind Lt. Muscare commands. (App. 100-101). However, there are not necessarily any masks available to such a company at any given time, because they may be in need of repair. (App. 101, 102, 104, 106).

In order for the breathing apparatus to work properly, the mask must be air-tight. In order to test for a proper seal, the following procedure is followed:

> "A. When the face piece is put on the face, there are five straps, head straps that you must adjust for tightness, starting at the bottom and then the temple straps and the top one, if necessary. After that, you either kink your breathing tube or put your hand over the the bottom and inhale to see if you have a proper seal on the face piece. If you have a proper seal, the face piece will collapse; if not, you will detect leaks around the edge of the face piece." (App. 65; see also App. 128).

Many factors can interfere with the ability to obtain a

proper seal, including facial hair of various sorts, dentures, oddly shaped faces, eye glasses, and boils. (App. 73, 88, 93, 95, 96). All witnesses for the Department agreed that the only certain way to determine whether a person can obtain a proper seal is for him to try the mask and test it himself. (App. 53, 67, 88, 94, 111).

The witnesses for the Department did express the belief that facial hair—sideburns and mustaches as well as beards—can interfere with the use of the latest kind of self-contained breathing equipment.[5] (App. 53, 55, 87, 88, 91, 112). However, many people with facial hair do obtain an adequate seal. (App. 74, 75, 93). In fact, Leonard Johnson, who provides instruction for the Department upon the use of the breathing equipment, testified that he realized that while he instructs that mustaches and sideburns can interfere with a proper seal, the Department permits them, many firemen wear them, and there has never been any problem in his experience in obtaining a seal by those firemen. (App. 61, 73-74, 75).

None of the Department's witnesses had any direct knowledge concerning whether or not Lt. Muscare could obtain a proper seal with the equipment (App. 72, 94, 111). Lt. Muscare, however, testified that he had used the self-contained breathing apparatus while wearing his goatee several times, both in actual fire-fighting situations and in drills, and had never experienced any problem with obtaining a proper seal. (App. 127, 129). In particular, he testified:

"Q. [W]hat test did you do to see if the mask sealed

[5] Some of the masks currently in use in the Fire Department are older Chemox masks. (App. 104-105). The evidence was not specific upon whether facial hair can affect the use of these masks.

on your face?

A. Put the mask on, slipping it up over your head on your chin first, take the two side straps on the mask, the top one and then the single one on top, put the tube on, put your hand on the bottom of the tube and suck and it should collapse on your face.
Q. And what was the result of your performance?
A. It collapsed on my face." (App. 128; see also App. 129.)

The district court, in ruling upon the validity of Rule 51.133, did not consider "in this ruling at all the issue of whether the Fire Department may have a dress and appearance code, solely for uniformity and the impression made on the public • • • " (App. 149). Rather, recognizing that the Fire Department had advanced only a safety justification,[6] the judge said that "[t]he question here is whether we have a justifiable regulation on the basis of which the Fire Department purports to justify it." (*Id.*) He found that "the requirement limiting facial hair for reasons of safety related to the fit of the face mask of self-contained breathing apparatus • • • appears to be grounded in reason," and therefore upheld the regulation. (*Id.*)

The Court of Appeals, while declining to rule conclusively upon the issue, questioned the district court's conclusion:

> "In passing, we note but without holding that the challenged hair regulation, § 51.133, does not appear to be co-extensive with the need for safe and efficient use of gas masks • • •." (App. 160, n. 2)

[6] The safety justification, as the above summary indicates, was limited to asserted problems with breathing apparatus.

III

Reams of paper and countless hours of judicial time have been expended in federal courts in the last several years on the question of whether the right to wear one's hair as one pleases is constitutionally protected at all and, if so, the extent of the protection. Whatever the differences between the courts, we believe it undeniable that the Fourteenth Amendment of the Constitution does impose restraints upon the interference of state governmental bodies with the personal appearance choices of citizens, and that the task for the courts is to indicate the parameters of the permissible restraints. Clearly, the right to "liberty" protected by the Fourteenth Amendment (and the Fifth Amendment) "is not confined to mere freedom from bodily restraint." *Bolling* v. *Sharp*, 347 U.S. 497, 499-500. Rather, the right to liberty "is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints." *Poe* v. *Ullman*, 367 U.S. 497, 543 (Mr. Justice Harlan, dissenting). Thus, "[i]n a line of decisions, going back perhaps as far as *Union Pacific R. Co.* v. *Botsford*, 141 U.S. 250 (1891), the Court has recognized • • • a guarantee of certain areas • • • of privacy • • • under the Constitution." *Roe* v. *Wade*, 410 U.S. 113, 152.

As the cases cited in the *Roe* opinion, 410 U.S. at 152-153 show,[7] the Court's definition of the areas into which the government may not interfere has not been limited to "privacy" in the sense of things which occur in secret, or which a person may attempt to hide from the government

[7] See also, e. g. *Kent* v. *Dulles*, 357 U.S. 116; *Shapiro* v. *Thompson*, 394 U.S. 618; *Stanley* v. *Georgia*, 394 U.S. 557.

or the public. Rather, these aspects of liberty are "private" in the sense that the government ordinarily has no legitimate interest in them, and citizens are therefore free to make their own decisions regarding them. For example, the right to educate one's children as one sees fit, within certain limits, protected in *Pierce* v. *Society of Sisters,* 268 U.S. 510, 535, and *Meyer* v. *Nebraska,* 262 U.S. 390, 399, arises from the fact that there is no "general power of the state to standardize its children," *Pierce, supra,* 268 U.S. at 535; it is not dependent upon whether the parent wishes to broadcast or to conceal the choice of education made for the child.

Thus, the "liberty" protection of the Fourteenth Amendment extends to "those privileges long recognized • • • as essential to the orderly pursuit of happiness by free man." *Meyer, supra,* 262 U.S., at 399; it is not limited to the particular guarantees spelled out in the First through Eighth Amendments, or to those particular additional rights recognized by this Court at any particular time. Nor can it be limited to intrusions into momentous matters. For, as the Courts of Appeals which have dealt with hair regulation have recognized,[8] the liberty protection is designed to safeguard against authoritarianism generally, a hallmark of which is interference into aspects of human existence which are *not* of great public importance but matter a great deal to the individual, such as dress and hairstyles.[9]

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[8] *E.g., Richards* v. *Thurston,* 424 F.2d 1281, 1285; *Crews* v. *Clone,* 432 F.2d 1259, 1264.

[9] For example, much of the discomfort Americans feel in visiting countries in Eastern Europe, or China, is expressed as dismay over the physical uniformity in appearance, and the lack of individualism in dress.

Thus, it seems clear that a state or municipality could not prescribe in detail the hairstyles to be worn by all women walking the public streets without running afoul of the Constitutional liberty protection, even if the particular hairstyle proscribed was one currently in vogue at the time of the regulation. Nor, it seems to us, could the Government require of its own employees, for purposes of identifiability, modes of grooming likely to subject them to ridicule in their off-duty hours—shaven heads for men, for example.

On the other hand, just as the Constitution does not grant citizens an "unlimited right to do with one's body as one pleases." *Roe, supra,* 410 U.S., at 154, the right to determine one's own appearance is far from unlimited. Clearly, the government can limit this right in pursuit of *legitimate* objectives, as long as the regulation is rationally related to the objective, as long as the objective is in fact legitimate, and as long as the degree of the intrusion does not unnecessarily go far beyond its justification. For example, we doubt that an interest in uniformity could ever suffice to justify regulation of appearance of citizens generally. See, e.g., *O'Connor* v. *Donaldson,* 422 U.S. 563, 575:

> "May the State fence in the harmless mentally ill solely to save its citizens from exposure to those whose ways are different? One might as well ask if the State, to avoid public unease, could incarcerate all who are physically unattractive or socially eccentric. Mere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty."

Yet, a government does have a strong interest in assuring that certain of its employees are readily identifiable, so that the public can recognize their authority immediately.

To this end, and to the extent required by the identifiability need, a state or city may require uniformity of appearance during working hours, s is commonly done for policemen and, as in this case, for firemen. But once the extent of the regulation reaches beyond the interest which justifies it, we believe it unconstitutionally intrudes into that area of self-determination of personality and life style which the Constitution protects. Thus, since a city has no interest in whether firemen are readily identifiable as such when they are not on duty, it could not require them to wear uniforms even when not working.

It appears, then, that the focus in assessing the validity of grooming regulations must be threefold. First, what is the purpose of the regulation, and is that purpose a legitimate one? Second, to what extent does the regulation intrude upon the ordinary perogative of an individual to determine his own appearance? And finally, and often determinative, is the scope of the regulation, both in terms of coverage and degree of intrusion, generally coextensive with the justification for it?

IV

Using this approach, it seems apparent that the Department's Rule 51.133 cannot stand. As indicated above, *supra* at 5, 8, the sole justification offered for the rule was that facial hair can interfere with the use of self-containing breathing equipment. The Department not only did not suggest any other interest in the matter, but its spokesmen affirmatively disclaimed any other concern. *Supra*, at 5-6. In these circumstances, the analysis must be confined to the justification pressed below.[10]

[10] We note in passing that even if this Court were to inquire

The interest asserted by the Department in safety is obviously one not only legitimate but, if substantiated, entitled to much weight. Thus, safety regulations mandated by state and federal governments for employees generally, not only government employees, can and do prescribe apparel to be worn on the job to assure against accidents, and any deprivation of a liberty interest involved can surely be overriden by that goal.

But the intrusion here reaches beyond working hours into the firemen's daily lives, since one cannot instantaneously grow and ungrow facial hair. And a hair regulation entails control of one's physical body, rather than merely determining what is put on it.

This is not to say that even such an intrusion could be justified by safety concerns in the proper case. Here, however, the regulation on its face goes far beyond any safety need conceivably shown on this record. There was undisputed testimony that only the wearer can tell if a mask fits properly, and that Lt. Muscare always succeeded in achiev-

into whether the disclaimed purposes could justify the Rule, the Rule still could not stand. First, any interest the Department might have is assuring identifiability of its personnel while on duty surely could not justify it. There is an intrusion into the employees' off-duty hours when hair styles are regulated which uniforms and general neatness standards do not present; and the uniform suffices to assure the identification required. The notion that the public might question whether a uniformed fireman with a beard is really a fireman, if it has any basis in fact at all, could arise only because of general knowledge that the Department does not hire firemen with beards. For example, the public might have some doubt whether a woman in a fireman's uniform was really a fireman, never having seen a woman fireman. Surely, this perception could not justify a refusal to hire women, and it is doubtful that it could justify a rule that all women fireman wear uniform

ing a proper seal when wearing his beard [11] (*supra,* at 6-7). Moreover, the fire department's reliance upon these masks for safety seems questionable: not only are there never enough masks available for all the firemen at the scene of a fire (App. 103-104), but some companies at times have no masks at all. (*supra,* at 6.) Further, the grooming regulations apply to individuals whose assignments do not include active firefighting (*supra,* at 4), and regulates hair other than facial hair although there was no evidence that such hair can affect the seal on the breathing apparatus. Finally and most significant, the regulation *permits* certain facial hair—mustaches and sideburns—even though the testimony on impact of facial hair upon safety masks did not distinguish between beards on the one hand and mustaches and sideburns on the other.

Thus, the regulation in some respects goes far beyond its asserted purpose, and in other ways is inadequate to assure the claimed goal. Moreover, when the Department has not demonstrated a concern with the efficient use of these masks sufficient to impel them to assure their availability at all, this Court should not sanction an intrusion into the constitutional rights of employees which carries over into nonworking hours. And to the extent that there is any serious concern with the fit of the masks, the Department need only require firemen to test the masks intermittently to see if they work on their faces; if a fireman with facial hair failed to achieve a seal, an order to shave might then be justified. In this circumstance, to uphold the regulation would be to sanction a deprivation of liberty which is unnecessary, broader than any conceivable justification based on use of breathing apparatus, and, in view both of the exceptions in the regulation itself and the Department's actions concerning the masks, is not rationally related to any safety goals which *this* Department has set. Therefore, the Rule 51.133 must be declared invalid.

blond wigs, or short hair, to assure the public of their *bona fides.*

Second, an interest in discipline *qua* discipline is not, at least in the fire department context here, a legitimate concern in itself. As Chief Foley recognized in testifying in the district court, *any* organization has an interest in having employees follow directives (App. 115). But to exalt that interest into a justification for imposing arbitrary rules upon civilian employees without any independent purpose whatever would be to sanction any intrusion into the constitutional rights of government employees. *Cf. Keyishian* v. *Board of Regents,* 385 U.S. 589, 605-606: "[T]he theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected."

[11] Petitioner seems to suggest that because Lt. Muscare did not put on the breathing apparatus at the district court hearing, the record is not conclusive upon whether he could obtain a seal. (Brief for Petitioner, at 12.) Surely, there is no rule of evidence which requires a party to substantiate undisputed testimony with a physical demonstration.

CONCLUSION

For the foregoing reasons, if the Court determines to decide the validity of Rule 51.133, the Rule should be declared unconstitutional, and the judgment of the Court of Appeals that Lt. Muscare was unconstitutionally suspended affirmed.

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